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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-687

NORMA FRANCES RAOUL CLARK and
ANN ELIZABETH RAOUL,
Petitioners,

vs.

AMERICAN NATIONAL BANK AND TRUST
COMPANY OF CHATTANOOGA,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR ISSUANCE OF WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR ISSUANCE OF WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

Respondent, American National Bank and Trust Company of Chattanooga, opposes the granting of the petition for certiorari for the following reasons.

JURISDICTION

This Court is without jurisdiction to consider this case because:

(a) No constitutional right of petitioners was violated by the refusal of the Supreme Court of Tennessee to grant either their petition for writ of certiorari to the Court of Appeals of Tennessee, or their petition for a rehearing; and

(b) Petitioners did not advance their claim of constitutional right until they filed a petition for a rehearing in the Supreme Court of Tennessee after that Court by final judgment had refused to grant their petition for writ of certiorari to the Court of Appeals of Tennessee (A. 76-77); and

(c) The petition for writ of certiorari to this Court does not meet either the letter or spirit of Rule 19 of this Court or of 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Three questions are presented:

1. Whether litigants who have had the benefit of a full judicial hearing through all of the courts of a state and have lost their case, will be heard to complain that their constitutional rights have been violated because the state court chose to follow one line of decisions which it deemed controlling rather than another line which the unsuccessful litigants deemed controlling?

2. Whether an attempt to inject a federal question into a case for the first time in a petition to rehear before the court of last resort of a state is timely, where the alleged question was not presented in any of the pleadings or proceedings prior to the petition to rehear?

3. When a state statute of limitations as construed by the highest court of the state establishes that the one-year statute of limitations begins to run in malpractice and products liability cases for personal injury from the date the injury was, or should

in exercise of reasonable care have been, discovered, and that the six-year statute of limitations in suits involving breach of trust begins to run from the date of the termination of that trust, does such construction constitute a violation of either the equal protection clause or of the due process clause of the Fourteenth Amendment?

STATEMENT OF CASE

Petitioners have not included a statement of the case in their petition, presumably considering their "Statement of Facts" to include such, hence the necessity of this statement by respondent.

This suit was brought in 1964 by petitioners who were beneficiaries of two trusts established in the early 1930's by their uncle and grandmother to assure petitioners' education, against respondent as trustee alleging a breach of trust in the 1944 exchange by the trustee of 323 shares of Cavalier Corporation common stock, on which no dividends had been paid during the preceding 20 years, for an equal number of $100.00 par value preferred shares of the same company on which dividends, within specified limits, had to be paid if earned. By their terms, the trusts were to terminate upon the later of the youngest petitioner becoming 25 years of age or the death of their father. He died in 1956 after the youngest petitioner had reached 25 years of age and the trusts then terminated. (A. 48-52).

In 1963 Cavalier was sold to another company for in excess of $12,000,000.00 and all outstanding preferred stock was redeemed at its call price plus accrued dividends. (A. 49). Upon realizing that they would not share in the sale proceeds above the call price of the preferred stock petitioners brought suit claiming breach of trust by the trustee, although they had found no fault with the trustee's handling of the trust during twenty years prior filing suit. (A. 25). Petitioners suffered no loss of principal, only failure to receive windfall profits.

This case has been in the Tennessee courts for almost eleven years. Filed in 1964, there were extensive discovery procedures and a trial in the Chancery Court, Hamilton County, Tennessee, before the Chancellor without a jury. After long deliberation he dismissed the suit on March 25, 1970 on the ground of laches. (A. 21-26). Upon appeal to the Court of Appeals of Tennessee by petitioners, the Chancellor's holding was reversed and the case remanded to the Chancellor for consideration of points pretermitted by him in his first opinion. (A. 26-34) Respondent's petition to rehear to that Court was denied (A. 35), and thereafter the case was again argued before the Chancellor and after further deliberation he rendered judgment on March 15, 1973 for petitioners (A. 36-47), stating, however, that if he were free to do so he would have sustained respondent's plea of the six-year statute of limitations. (A. 37).

The case again went to the Court of Appeals of Tennessee upon respondent's appeal, and that court reversed the Chancellor and dismissed the suit, holding that the six-year statute of limitations, T.C.A. 28-309,[1] had run before suit was filed in 1964 and that the suit was barred. (A. 48-69). Petitioners filed a petition to rehear which was denied (A. 71-73), as was their petition to the Supreme Court of Tennessee for a writ of certiorari to the Court of Appeals of Tennessee. (A. 74). Petitioners then filed a petition in the Supreme Court of Tennessee for a rehearing and in this petition, for the first time, they advanced the claim that their constitutional rights had been violated by a

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[1] 28-309. *Rent—Misconduct of public officers—Contracts not otherwise covered.*—Actions for the use and occupation of land and for rent; actions against the sureties of guardians, executors and administrators, sheriffs, clerks, and other public officers, for nonfeasance, misfeasance, and malfeasance in office; and actions on contracts not otherwise expressly provided for, shall be commenced within six (6) years after the cause of action accrued. Provided, that the cause of action on title insurance policies, guaranteeing title to real estate, shall accrue on the date the loss or damage insured or guaranteed against is sustained. [Code 1858, § 2775 (deriv. Acts. 1715, ch. 27, § 5); Shan., § 4472; Code 1932, § 8600; Acts 1947, ch. 126; § 1; C. Supp. 1950, § 8600.]

failure of Supreme Court of Tennessee to follow the case of *Teeters v. Currey*, 518 S.W.2d 512 (1974), instead of *Third National Bank v. Nashville Trust Company*, 191 Tenn. 123, 232 S.W.2d 7 (1950), which holds that the Tennessee six-year statute of limitations, T.C.A. 28-309, applies to trusts which have terminated. (Resp. A-3). *Teeters* was a medical malpractice case construing Tennessee's one-year statute of limitations on actions for personal injuries, T.C.A. 28-304[2] and holding that the statute begins to run only after the injury is known to the claimant or by the exercise of reasonable diligence should have been known. In its opinion denying petitioner's petition to rehear the Supreme Court of Tennessee said:

> "We fully considered Teeters, supra, and concluded that it had no relevance to the issues in this controversy. The petition to rehear is respectfully denied." (A. 77)

Teeters was decided December 9, 1974. The petition to the Tennessee Supreme Court for writ of certiorari was dated February 4, 1975 and filed at that time, and it cited and relied on *Teeters* but made no claim that petitioners had a constitutional right to have the Court follow *Teeters* rather than *Third National Bank*. (Resp. A. 1-A. 4).

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[2] 28-304. *Personal tort actions—Malpractice of attorneys—Civil rights actions—Statutory penalties.*—Actions for libel, for injuries to the person, false, imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes, and actions for statutory penalties shall be commenced within one (1) year after cause of action accrued. For the purpose of this section, insofar as products liability cases are concerned, the cause of action for injury to the person shall accrue on the date of the personal injury not the date of the negligence or the sale of a product and in said products cases no person shall be deprived of his right to maintain his cause of action until one (1) year from the date of his injury and under no circumstances shall his cause of action be barred before he sustains an injury. [Code 1858, § 2772 (deriv. Acts. 1715, ch. 27, § 5); Shan. § 4469; mod. Code 1932, § 8595; Acts. 1967, ch. 283, § 1; 1969, ch. 28, § 1; 1969, ch. 293, §§ 1, 2; 1972, ch. 669, § 1.]

FACTS FOUND BY THE COURT OF APPEALS

The statement of facts set forth on pages 5-10 of petitioners' brief is unacceptable to respondent, being excerpts taken out of context from the transcript, the exhibits and lower court decisions, and frequently contradicted by other evidence and court findings.

The facts relevant to the issue before this Court as found by the Court of Appeals are: (1) the trusts involved terminated in 1956 (A. 56); (2) the new trust was not an extension of the old trusts (A. 56); (3) the 1944 exchange of stock was not a fraudulent exchange (A. 58); (4) if the exchange was in fact imprudent, it was at most a mistake in judgment (A. 58); (5) there was no concealment from anyone by the trustee (A. 56-59); (6) there was no breach of loyalty by the trustee (A. 64-66); and (7) the statute of limitations began to run on the trust October 15, 1956 (A. 57), more than six years prior to the filing of this suit and barred the suit.

LAW AND ARGUMENT

This Court Is Without Jurisdiction in This Case.

1. **The Supreme Court of Tennessee Violated No Constitutional Right of Petitioners by Refusing to Apply the Doctrine of Teeters to This Case.**

The Court of Appeals of Tennessee held that the trusts involved in this case had terminated in 1956, and that this case, which was not filed until 1964, was barred by the Tennessee six-year statute of limitations. (A. 48-69). By refusing to grant the petition for writ of certiorari to the Court of Appeals, the Supreme Court of Tennessee affirmed the applicability to this case of *Third National Bank v. Nashville Trust Co., supra,* which the Court of Appeals cited and followed, and not *Teeters* as petitioners urged.

The six-year statute of limitations which barred this action deals with contracts not otherwise provided for under other sections of the Code which establish different periods required to bar an action, ranging from 90 days for actions seeking to recover a gambling loss (T.C.A. 28-306) to ten years in certain other types of actions (T.C.A. 28-310), with intermediate periods between these two extremes depending on the type of action brought.

If petitioners' contention that they have a constitutional right to have the Tennessee court follow *Teeters* rather than *Third National Bank* were the law, no appellate court would be free to use its own independent judgment in the application of its own precedents to the facts before it. Each litigant would have a constitutional right to have the court hold that a principle of law favorable to that litigant be applied as controlling in the case. Obviously, this is sheer nonsense. All appellate courts have not

only the right, but the absolute duty, to use their independent judgment as to whether or not a particular rule of law applies to the facts before that Court.

(a) **Petitioners have suffered no deprivation of due process.**

Even if this Court should be of the opinion that the Tennessee court erred in failing to hold that *Teeters* was controlling, no due process right of petitioners would have been violated, *Central Land Company v. Laidley*, 159 U.S. 103, 16 S. Ct. 80, 40 L. Ed. 91 (1895), where this Court said:

> "When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the United States. (citing, authorities)
>
> "This Court, therefore, has no authority to decide the main questions, argued at the bar, whether the decision of the supreme court of appeals of West Virginia, in effect, and erroneously, overruled the prior decisions of that court and of the supreme court of appeals of Virginia before West Virginia became a separate state; and the writ of error must be dismissed for want of jurisdiction." (40 L. Ed. p. 95)

Nor would their rights have been violated if the Tennessee court had reversed a former decision to petitioners' detriment, *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 44 S. Ct. 197, 68 L. Ed. 382 (1924), where, applicable here, this Court said, "The parties to this action have been fully heard in the state court in the regular course of judicial proceedings, and in such case the mere fact that the state court reversed a former decision, to the prejudice of one party, does not take away his property without due process of law." (68 L. Ed. 385).

As stated by Mr. Justice Cardozo in considering due process in *Roberts v. City of New York*, 295 U.S. 264, 55 S. Ct. 689, 79 L. Ed. 1429 (1935):

> "One cannot hope to mark its bearings in a sentence or a paragraph. Enough for present purposes that when the hearing has been full and candid, there must ordinarily be a showing of something more far-reaching than one of dubious mistake in the appraisal of the evidence. Due process is a growth too sturdy to succumb to the infection of the least ingredient of error. 'It takes more than a possible misconstruction by a court to make a case under the Fourteenth Amendment.' Seattle, R. & S. R. Co. v. Washington, (1913) 231 U.S. 568, 570, 34 St. Ct. 185 (58 L. Ed. 372." (79 L. Ed. 1436)
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> * * * * * * *
>
> "Problems open in the state court and there considered in the opinions (see especially the dissenting opinion in 265 N.Y. at p. 183, 192 N.E. 188), are beyond our jurisdiction here. Enough for present purposes that the award is not too low, though perhaps it is too high. Excess is not an error of which the owner may complain." (79 L. Ed. 1438)

It has been said no precise definition of "due process of law" can be given because it is a living thing depending on the nature of the rights and remedies involved, but when ". . . applied to judicial proceedings, mean(s) a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights", *Endicott-Johnson Corp. v. Encyclopedia Press*, 266 U.S. 291, 45 S. Ct. 63, 69 L. Ed. 288, 292 (1924). A general law administered in its legal course according to the form of procedure suitable and proper to the nature of the case, conformable to fundamental rules of right and affecting all persons alike is due process.

The eleven year odyssey of this case through the Tennessee courts has already been recounted, and it shows beyond question that petitioners were accorded a full and fair hearing and that due process was accorded them.

(b) **Nor have petitioners' equal protection rights been violated.**

Petitioners concede, as they must, on page 11 of their petition that the equal protection clause does not assure uniformity of judicial decision or immunity from judicial error, citing *Beck v. Washington*, 369 U.S. 541, 82 S. Ct. 955, 8 L. Ed.2d 98 (1962), and *Milwaukee Electric Railway & Light Company v. Wisconsin, ex rel. Milwaukee*, 252 U.S. 100, 40 S. Ct. 306, 64 L. Ed. 476 (1920). They seek to avoid this rule, however, by the nebulous theory that the Tennessee court did not overrule *Teeters* but merely asserted that it had no relevancy in this case. This is a classic example of a distinction without a difference, and borders on the frivolous.

In *Milwaukee Electric Ry., supra*, this Court considered a contention similar to that of petitioners here:

> "The company also insists that the ordinance is void because it denies equal protection of the laws. The contention rests upon the fact that since entry of the judgment below the Supreme Court of the state has decided Superior v. Duluth Street R. Co., 166 Wis. 487, 165 N.W. 1081, which the company alleges is not reconcilable with its decision in this case. The similarity of the ordinances and conditions in the two cases does not seem to us as clear as is asserted. But, however that may be, the Fourteenth Amendment does not, in guaranteeing equal protection of the laws assure uniformity of judicial decisions (Backus, Jr. & Sons v. Fort Street Union Depot Co., 169 U.S. 557, 569, 42 L. Ed. 853, 859, 18 S. Ct. Rep. 445),

any more than, in guaranteeing due process, it assures immunity from judicial error (Central Land Co. v. Laidley, 159 U.S. 103, 40 L. Ed. 91, 16 Sup. Ct. Rep. 80; Tracey v. Ginzberg, 205 U.S. 170, 51 L. Ed. 755, 27 Sup. Ct. Rep. 461). Unlike Gelpcke v. Dubuque, 1 Wall. 175, 17 L. Ed. 520 and Muhlker v. New York, 197 U.S. 544, 49 L. Ed. 872, 25 Sup. Ct. Rep. 522, where protection was afforded to rights acquired on the faith of decisions later overruled, the company seeks here to base rights on a later decision between strangers, which, it alleges, is irreconcilable on a matter of law with the decision theretofore rendered against it. The contention is clearly unsound." (64 L. Ed. 480)

See also, *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 58 S. Ct. 185, 82 L. Ed 268 (1937), and *Gryger v. Burke*, 334 U.S. 728, 68 S. Ct. 382, 92 L. Ed. 1683 (1948).

(c) **The construction of a state statute of limitations is a local question, not a federal one, and the Tennessee court's construction of the Tennessee statute did not deny petitioners due process under the Fourteenth Amendment.**

Petitioners' contention is that the state court should have construed the six year statute of limitations. T.C.A. 28-309, to include the "discovery doctrine" of the medical malpractice case of *Teeters* and the subsequent products liability case of *McCroskey v. Bryant Air Conditioning Co.*, 524 S.W.2d 487 (1975), both of which involved a one year personal injury statute of limitations. Conceding, for argument only, but denying otherwise, a factual basis in this case for invoking this doctrine, nevertheless no due process question is involved.

This Court on many occasions has said that the decision of a state court interpreting its own statute of limitations is con-

trolling, being a local question and not a federal one. In 1896, speaking through Mr. Justice Gray, in *Great Western Telegraph Co. v. Purdy*, 162 U.S. 329, 16 S. Ct. 810, 40 L. Ed. 986, a suit involving the proper interpretation of different statutes of limitations, this Court said:

> "The limitation of actions is governed by the *lex fori*, and is controlled by the legislation of the state in which the action is brought, as construed by the highest court of that state, . . ."
>
> * * * * * * * *
>
> "The question at what time the cause of action accrued in this case, within the meaning of the statute of limitations of Iowa, was not a Federal question, but a local question, upon which the judgment of the highest court of the state cannot be reviewed by this court." (40 L. Ed. 991)

The distinction between limitations applicable to a suit against a trustee for an alleged breach of trust and one for personal injury as a result of medical malpractice or products liability is not only a reasonable and justifiable classification but is a practical necessity. The Tennessee court in *Teeters* reversed a long line of decisions on the reasoning that it was unfair to have an injured person's action barred by a one-year statute of limitations when the person did not and could not with reasonable diligence have known of the existence of the injury until after the action was barred. The same reasoning was applied by the court in *McCrosky*. The case before this Court involves a trust which had been in existence for many years, terminating in 1956. The termination of the trust was a definite and positive event. The beneficiaries of that trust, both adults, had six years from the date of termination to make any investigation they chose as to the propriety of the trustee's action in managing the trust over the preceding years. Absent fraud or concealment, and here there was specifically found to be neither, the

beneficiaries are rightfully barred after the expiration of the six-year statutory period. Were this not so a beneficiary could deliberately remain unaware of a breach of trust until such time as he could profit by the trustee's error, thus putting the beneficiary in a position of unconscionable advantage by placing the trustee in a position of continuing jeopardy for an indefinite period of time. The Tennessee legislature and the Tennessee Supreme Court have determined that full protection is given to the beneficiary by allowing six years from the date of termination of the trust to assert any claim he thinks he may have. To hold otherwise would make it virtually impossible to obtain the services of any reasonable person or corporation in the capacity of trustee.

2. **In Any Event, Petitioners' Attempt to Raise a Constitutional Question Comes Too Late.**

(a) **When petitioners first raised the constitutional question this case had been back and forth in the Tennessee courts almost eleven years.**

As pointed out (*supra*, p. 4), petitioners attempted to raise a constitutional question for the first time in their petition to the Supreme Court of Tennessee for a rehearing of its denial of their petition for certiorari. (Resp. A. 2). This was in 1975, eleven years after the case was filed. The *Teeters* case, upon which their constitutional contention is based, was decided several months before they filed their petition for writ of certiorari. They expressly relied upon *Teeters* in their petition and listed seven (7) alleged errors of the Court of Appeals, ". . . in sustaining the defense of the six year statute of limitations . . ." (Resp. A. 2-3) In none of the assigned errors is there a claim that their constitutional rights were violated by failure of the Court of Appeals to follow *Teeters* instead of *Third National Bank*. (Resp. A. 1-A. 3).

"This Court has decided many times that it is too late to raise a Federal question for the first time in a petition for rehearing in the court of last resort of a state after that court has pronounced its final decision," *McCorquodale v. Texas*, 211 U.S. 432, 29 S. Ct. 146, 53 L. Ed. 269, 270, 271 (1908); *Herndon v. Georgia*, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530, 1532 (1935), rehear. den. 296 U.S. 661, 56 S. Ct. 82, 80 L. Ed. 471 (1935). Refusal by the Supreme Court of Tennessee to grant certiorari is a final decision by that Court. No further proceeding, save a petition to rehear, is available to a litigant.

(b) **The constitutional question is an obvious afterthought.**

A statement on "all fours" with the situation in the present case was made by this Court in *Chicago I. & L. R. Co. v. McGuire*, 196 U.S. 128, 25 S. Ct. 200, 49 L. Ed. 413 (1905):

> "This case is the not infrequent one of an attempt to clutch at the jurisdiction of this court as an afterthought, when all other resources of litigation have been exhausted." (49 L. Ed. 417)

Commenting on a similar situation this Court, in *McMillen v. Ferrum Min. Co.*, 197 U.S. 343, 25 S. Ct. 533, 49 L. Ed. 784, 787 (1905), said "It is sufficient for the purposes of this case to say that no Federal question appears to have been raised until the petition was filed for a rehearing. This was obviously too late, unless, at least, the court grants the rehearing and then proceeds to consider the question. *Mallett v. North Carolina*, 181 U.S. 589, 21 S. Ct. Rep. 730, 45 L. Ed. 1015 (1901); *Loeber v. Schroeder*, 149 U.S. 580, 13 S. Ct. Rep. 934, 37 L. Ed. 856 (1893); *Miller v. Texas*, 153 U.S. 535, 14 S. Ct. Rep. 874, 38 L. Ed. 812 (1894). The Tennessee court did not grant the petition to rehear and did not pass on the constitutional question, merely holding that it had ". . . fully considered *Teet-*

ers, supra, and concluded that it had no relevance to the issues in this controversy." (A. 77). It had adequate state grounds on which to base its decision and obviously considered the eleventh hour attempt to raise a constitutional question both untimely and meritless.

3. **This Petition Meets Neither the Letter Nor the Spirit of Rule 19 of This Court or of 28 U.S.C., § 1257(3).**

Conceding arguendo, but not in fact, that the constitutional question was timely raised, nevertheless the Tennessee court has not ". . . decided a federal question of substance not theretofore determined by this Court, or . . . in a way probably not in accord with applicable decisions of this court," nor have petitioners shown ". . . special and important reasons," for granting the petition, Rule 19.1(a). Nor has any "right" been "specially set up or claimed under the Constitution," 28 U.S.C. 1257(3), which would entitle petitioners to have this Court review the action of the Tennessee Supreme Court.

CONCLUSION

Petitioners' efforts to inject a constitutional question in this case is ". . . an attempt to clutch at the jurisdiction of this Court as an afterthought, when all other resources of litigation have been exhausted," *Chicago, etc. R. Co. v. McGuire, supra,* and the litigation has turned out adversely to them. During the eleven years this case was in the state courts, petitioners received a full and fair hearing, and having lost now turn to this Court.

The state court followed its established precedent in refusing to apply the discovery doctrine of *Teeters* to this case. It did not grant the petition to rehear, and did not consider the alleged federal question.

No constitutional right of petitioners was violated. They have not met the requirements for consideration by this Court and should be repelled.

Respondent respectfully insists that the petition for writ of certiorari should be denied.

Respectfully submitted

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